Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

GLOBAL NAPS, INC.,

Petitioner,

v.

VERIZON NEW ENGLAND, INC. AND MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY, PAUL B. VASINGTON, JAMES CONNELLY, W. ROBERT KEATING, DIERDRE K. MANNING, AND EUGENE J. SULLIVAN, IN THEIR CAPACITIES AS COMMISSIONERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a competitive local exchange carrier may adopt the terms of an interconnection agreement pursuant to 47 U.S.C. § 251(i) after receiving less favorable terms for an interconnection agreement through arbitration before a state commission under 47 U.S.C. § 252(a)(2)?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are Global NAPs, Inc. (Global), Petitioner, Verizon New England Inc. (Verizon), Respondent, the Massachusetts Department of Telecommunications and Energy (DTE), Respondent, and Paul B. Vasington, James Connelly, W. Robert Keating, Dierdre K. Manning and Eugene J. Sullivan in their capacity as Commissioners, Respondents.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states that the parent company of Global is Ferrous Miner Holdings, Ltd., a Delaware corporation, and that no publicly held corporation has a ten percent or greater ownership interest in Global.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	viii
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY PROVISIONS AND REGULATIONS	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	5
A. The First Circuit's decision abrogates an express right granted to CLEC's in § 252(i) of the Act.	5
B. The First Circuit's concern about the powers vested in state commissions was misplaced.	13

Contents

Page

C. The First Circuit's concern about the binding nature of arbitral decisions was misplaced. 13

D. The First Circuit's concern about the statutory duties of good faith and cooperation was misplaced. 14

E. The First Circuit's concern about the judicial review provisions of the Act was misplaced. 15

F. The First Circuit's reliance on FCC regulations was misplaced. 16

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Cases	Page
Anderson v. Yungkau, 329 U.S. 482 (1947)	6
Estate of Coward v. Nichos Drilling Co., 505 U.S. 469 (1992)	6
Escoe v. Zerbst, 295 U.S. 490 (1935)	6
Iselin v. United States, 270 U.S. 245 (1926)	7
Keene Corporation v. United States, 508 U.S. 200 (1993)	7
Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)	6
Maryland v. Dyson, 527 U.S. 465 (1999)	18
Riva v. Commonwealth of Massachusetts, 61 F.3d 1003 (1st Cir. 1995)	6
Tcherepnin v. Knight, 389 U.S. 332 (1967)	13
U.S. West v. Sprint Communication, 275 F.3d 1241 (10th Cir. 2002)	3, 10
Verizon Maryland v. Public Service Commission of Maryland, 535 U.S. 635 (2002)	8

Cited Authorities

Page

Decisions of the Federal Communications Commission

First Report and Order, *in the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* 61 FR 45619 (Aug. 8, 1996) ("*Local Competition Order*") 8

Statutes, Rules and Regulations

28 U.S.C. § 1254(1) 1

47 U.S.C. § 251 ..... 2, 3, 16

47 U.S.C. 251(c)(2)(D) 3

47 U.S.C. § 252 ..... 2, 7, 10

47 U.S.C. § 252(a) 5

47 U.S.C. § 252(a)(1) 3

47 U.S.C. § 252(a)(2) i

47 U.S.C. § 252(b) 5, 13

47 U.S.C. § 252(b)(1) 3

47 U.S.C. § 252(b)(5) 14, 15

Cited Authorities

Page

47 U.S.C. § 252(e)(6) 4, 13 14, 15

47 U.S.C. § 252(f) 11

47 U.S.C. § 252(h) 17

47 U.S.C. § 252(i) ..... *passim*

Sup. Ct. R. 16.1 18

47 C.F.R. § 51.809 (2000) 2, 10, 11, 12

47 C.F.R. § 51.809(b) (2000) 16

47 C.F.R. § 51.809(c) (2000) 17

69 FR 43762 11

Telecommunications Act of 1996, Pub.L. No. 104-110 Stat. 56 (1996) 7-8

Miscellaneous

H.R. Rep. No. 101-204, at 50 (1996) reprinted in 1996 U.S.C.C.A.N. 10 8

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The First Circuit Dated January 19, 2005 ..... 1a

Appendix B — Opinion Of The United States District Court For The District Of Massachusetts Dated August 27, 2002 ..... 25a

Appendix C — Order On Verizon New England. Inc. D/B/A Verizon Massachusetts' Motion For Approval Of Final Arbitration Agreement Or, In The Alternative For Clarification Dated February 19, 2003 ..... 66a

Appendix D — Relevant Statutes And Regulation 83a

Petitioner, Global, respectfully requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit. As noted below, this case is also appropriate for summary disposition pursuant to Sup. Ct. R. 16.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported as *Global NAPs, Inc. v. Verizon New England, Inc.*, 396 F.3d 16 (1st Cir. 2005), and is reproduced in the Appendix to this Petition (Pet. App.) at 1a–24a.

That decision affirmed a ruling by the United States District Court for the District of Massachusetts entitled *Global NAPs, Inc. v. Verizon New England, Inc.*, which is reproduced in full in the Pet. App. at 25a–32a.

The District Court decision, in turn, affirmed a decision by the DTE, which is reproduced in full in the Pet. App. at 33a–49a.

STATEMENT OF JURISDICTION

The final judgment of the First Circuit decision was entered on January 19, 2005. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND REGULATIONS

Section 251 of the Telecommunications Act, codified at 47 U.S.C. § 251, prescribes rules designed to fundamentally restructure the local exchange market in order to foster competition in the delivery of telecommunication services. The complete text of Section 251 is reproduced at Pet. App. 50a –59a.

Section 252 of the Telecommunications Act, codified at 47 U.S.C. § 252, establishes procedures for the negotiation, arbitration and approval of interconnection agreements between local exchange carriers. The complete text of Section 252 is reproduced at Pet. App. 60a –73a.

The Federal Communications Commission (FCC) promulgated a rule, codified at 47 C.F.R. § 51.809, concerning the adoption by one party of terms in interconnection agreements signed by another party. The complete text of § 51.809 is reproduced at Pet. App. 74a–75a.

INTRODUCTION

This case involves review of the First Circuit's decision that Global may not adopt, pursuant to the provisions of § 252(i) of the Act, the terms of an interconnection agreement entered into by Verizon and Sprint Communications Company, L.P. (Sprint) on the grounds that Global was seeking to avoid the terms of a previously arbitrated interconnection agreement with Verizon.

The First Circuit's ruling is in direct contravention to the express language of § 252(i) of the Act, and is inconsistent with a ruling by the Tenth Circuit Court of Appeals in the case of *U.S. West Communications, Inc. v. Sprint Communications Co.*, 275 F.3d 1241 (10th Cir. 2002). Worse, the First Circuit's interpretation of § 252(i) defeats the purpose of the section and largely renders it useless, and places a chilling effect on a competitive local exchange carrier's readiness to arbitrate an interconnection agreement with an incumbent local exchange carrier.

STATEMENT OF THE CASE

The Telecommunications Act of 1996, 47 U.S.C. § 251, *et seq.* (Act) requires incumbent local exchange carriers (ILECs) to permit competitive local exchange carriers (CLECs) to connect their telecommunications network to the ILEC's network "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2)(D). The terms and conditions of the connection are contained in interconnection agreements which can be negotiated, arbitrated before a state commission, and/or adopted from other such agreements entered into by the ILEC. 47 U.S.C. §§ 252(a)(1), 252(b)(1), 252(i).

This case pertains to the right of a CLEC to adopt the terms of an interconnection agreement entered into between an ILEC and another CLEC after it has obtained less favorable terms through arbitration. The facts are not in dispute.

On December 12, 2002, the DTE issued an Arbitration Order setting forth the terms of an interconnection agreement between Global and Verizon (Arbitration Order). Global appealed that Order to the Federal District Court pursuant to

47 U.S.C. § 252(e)(6) on the basis that it violated federal law in numerous respects, none of which are relevant here (Original Appeal). *See* Pet. App. at 6a. Subsequently, however — in an attempt to resolve the dispute and avoid the substantial cost and lengthy delay of an appeal — Global exercised its right under 47 U.S.C. § 252(i) to adopt in its entirety, for its own use with Verizon, an interconnection agreement between Verizon and another CLEC, Sprint (Sprint Agreement). Pet. App. 7a.

However, in an order dated February 19, 2003, the DTE refused to permit Global to adopt the Sprint Agreement (February 19, 2003 Order). Pet. App. at 7a. Instead, the DTE required that Global sign and submit an interconnection agreement consistent with the Arbitration Order (Arbitrated Agreement). Pet. App. 9a. This Order compounded the DTE's errors of federal law, and Global appealed it to Federal District Court (Sprint Agreement Appeal).

If Global were permitted to adopt the Sprint Agreement, then the Original Appeal would be moot because the terms of the Sprint Agreement would control Global and Verizon's relationship. Accordingly, the Original Appeal and the Sprint Agreement Appeal were consolidated on March 20, 2003. Pursuant to a scheduling order dated March 20, 2003, the parties proceeded with a summary judgment motion on the Sprint Agreement Appeal. The only issues considered were (1) whether the court had jurisdiction to review the February 19, 2003 Order, and (2) whether the DTE erred in refusing to permit Global to exercise its adoption rights under § 252(i).

On May 12, 2004, the Federal District Court ruled that jurisdiction was proper but that Global's right to opt into the

Sprint Agreement under § 252(i) was abolished by Global's previous decision to arbitrate (May 12, 2004 Order). Pet. App. 25a–32a. On May 28, 2004, Global filed its Notice of Appeal from that Order to the First Circuit. Pet. App. 10a.

On January 19, 2005, the First Circuit issued the decision which is the subject of this appeal, and affirmed the district court ruling. Pet. App. 1a–24a.

REASONS FOR GRANTING THE PETITION

A. The First Circuit's decision abrogates an express right granted to CLEC's in § 252(i) of the Act.

Section 252 of the Act sets forth the procedures for the negotiation, arbitration and approval of interconnection agreements between ILECs and CLECs. That section provides three separate methods by which CLECs may obtain terms under which they may interconnect with an ILEC. They may obtain those terms through direct negotiation with the ILEC, § 252(a), arbitration before a state commission, § 252(b), and/or by adoption of the same terms agreed to by the ILEC and another telecommunications carrier, § 252(i). The First Circuit has now applied a restriction on the rights afforded by § 252(i) by limiting it to carriers who have not yet entered arbitration. It was wrong to do so because interpreting the statute in this way violates the purpose and provisions of the Act.

In considering the meaning of § 252(i), "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary

circumstance, is finished." *Riva v. Commonwealth of Massachusetts*, 61 F.3d 1003, 1007 (1st Cir. 1995) (quoting *Estate of Coward v. Nichos Drilling Co.*, 505 U.S. 469, 475 (1992)) (internal quotation marks omitted). Absent a specific definition afforded by the statute itself, the words in the statute are to be given their ordinary meaning. *Id.*

Section 252(i) states in full:

> A local exchange carrier **shall make available** any interconnection, service, or network element provided under an agreement approved under this section to which it is a party **to any other requesting telecommunications carrier** upon the same terms and conditions as those provided in the agreement.

(Emphasis added).

The language of this section is both clear and specific. It states that ILECs, like Verizon, "shall" make available to CLECs, like Global, the same interconnection terms it has with another telecommunications carrier, such as Sprint. There is no provision permitting Verizon to do so only if it wants to or if certain conditions are met; the statute says it "shall" do so. The term "shall" is ordinarily "the language of command." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *Escoe v. Zerbst*, 295 U.S. 490 (1935). A statute with the mandatory term "shall" "normally creates an obligation impervious to judicial discretion." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Since there is no reason not to attribute to the word "shall" the meaning of an obligation, the meaning of a mandatory command should have been applied by the First Circuit.

Additionally, this section contains no provision limiting the CLECs to which Verizon must make those terms available. It does not provide that Verizon may pick and choose which CLECs it will permit to adopt those terms, and does not provide that a state commission has the right to restrict the CLECs which may do so. Rather, the statute clearly says Verizon must make them available "to any other requesting telecommunications carrier." Global is a "requesting telecommunications carrier." Therefore, Global should have been permitted to adopt the Sprint Agreement. There is no restriction anywhere else in § 252 or the rest of the Act preventing CLECs who have already sought arbitration from exercising their rights under § 252(i).

The First Circuit's creation of a restriction could only be based on the assumption that Congress intended to include a provision limiting the rights afforded by that section and for some reason did not do so. There is no support for such an omission anywhere in the statute, let alone § 252(i). Thus, the imposition of a restriction is not an interpretation of the statute, but rather "an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Iselin v. United States*, 270 U.S. 245, 251 (1926). "To supply omissions transcends the judicial function." *Id.* The Court has a "duty to refrain from reading a phrase into [a] statute when Congress has left it out." *Keene Corporation v. United States*, 508 U.S. 200, 208 (1993).

Finally, the imposition of a restriction is contrary to the express intention of the Act. The very purpose of the Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers, and encourage the rapid deployment of new telecommunications technology." Telecommunications Act of 1996, Pub.L. No. 104-104, 110

Stat. 56, 56 (1996). It was "designed to foster competition in local telephone markets." *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635, 638 (2002). Congress believed that "more competition, rather than more regulation, will benefit all [local telephone] consumers." H.R. Rep. No. 101-204, at 50 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 13.

Shortly after the passage of the Act, the FCC characterized § 252(i) as the "primary tool of the 1996 Act for preventing discrimination under section 251." *Local Competition Order,* 61 FR 45619 (August 8, 1996) *at* ¶1296. The FCC stated:

> We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers obtain access to terms and elements on a nondiscriminatory basis.

Id. ¶ 1316. Although the FCC specifically acknowledged that "subsequently negotiated" interconnection agreements fall within the adoption provisions of § 252(i), there is no reason to believe it intended to limit the scope of that section to only those agreements. Such an interpretation would mean that it was excluding from adoption the terms of agreements reached through arbitration. There is no indication from anything the FCC said anywhere in that decision that it wished to preclude CLECs from adopting the terms of interconnections that had been arbitrated by other carriers. Since the FCC recognized the purpose of § 252(i) as being to "maximize competition by ensuring that carriers obtain access to terms and elements on a nondiscriminatory basis," carving out arbitrated agreements would make no sense. To do so would create the discrimination the Act and the FCC are seeking to avoid. Similarly, carving out previously negotiated agreements would be pointless because it is just as critical to make available the terms of those agreements to competing carriers. The source of the terms is not important. Rather, the focus is on the availability of those terms to all carriers so they can compete with one another on an equal footing and thereby effectuate the purpose of the Act.

The Tenth Circuit has also recognized the significance of § 252(i):

> § 252(i) allows a CLEC to effectively amend its own interconnection agreement by taking advantage of more favorable provisions contained in other CLEC interconnection agreements. As Sprint argues, the provision, by allowing CLECs to purchase services at equal prices and on equal

> terms, enables a CLEC to remain competitive with other CLECs in the local market.

U.S. West v. Sprint Communication, 275 F.3d 1241, 1249 (2002). That Court's recognition of a CLEC's right to "effectively amend its own interconnection agreement" is entirely consistent with Global's position, and at odds with the First Circuit's. The Tenth Circuit's statement makes sense in light of the Act's purpose. By enabling a CLEC to amend its own interconnection agreement to take advantage of the most favorable terms available, § 252(i) assures an equal playing field for all CLECs. Obviously, a CLEC faced with an interconnection agreement less favorable than its competitors' agreements would not be able to compete in the marketplace. Both by its terms and by its intended effect, § 252(i) assures that regardless of the outcome of any particular negotiation or arbitration, all CLECs remain on equal footing.

The FCC has also adopted specific regulations defining when a CLEC may exercise its rights under § 252(i). FCC Rule 51.809 provides:

> (a) **An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act,** upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only

> to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the states commission that:
>
> > (1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
> >
> > (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.
>
> (c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

47 C.F.R. § 51.809 (2000) (emphasis added)[1]. Pet. App. 74a–75a. Under this regulation, a CLEC has the right to adopt

[1] This citation reflects the rule as it stood when Global adopted the Sprint Agreement. The regulation was amended July 22, 2004 and became effective August 23, 2004. 69 FR 43762. However, the changes are of no consequence to this issue since Global adopted the Sprint Agreement in its entirety.

"any individual interconnection, service, or network element arrangement contained in any agreement" unless: (a) the ILEC proves that "[t]he costs ... are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement"; (b) the ILEC proves that "[it] is not technically feasible"; or (c) more than a "reasonable period of time after the approved agreement is available" has elapsed. None of these conditions apply here.

Nothing in the DTE's February 19, 2003 Order states that Global cannot adopt the Sprint Agreement due to cost, technical feasibility, or because more than a reasonable period of time after its approval had passed. In fact, the "Analysis and Findings" section of the February 19, 2003 Order contains no mention of the 47 C.F.R. § 51.809 factors at all. Pet. App. 42a–48a.

Instead, the First Circuit invented a new restriction — not contained or implied either in the text of § 252(i) or the FCC's implementing regulations — to strip Global of its § 252(i) right to operate on the same terms and conditions that apply to any other CLEC in Massachusetts interconnected with Verizon. It relied on the procedural status of the arbitration relative to the execution of the Sprint Agreement. Its sole concern was that Global had first attended an arbitration and later decided to exercise its adoption rights under § 252(i). The plain effect of this ruling (whatever its purpose might have been) is to establish precisely the kind of discrimination that § 252(i) is intended to avoid. Global is being forced to operate under the particularly onerous (and erroneous) terms laid out in the Arbitration Order even though no other CLEC in Massachusetts is required to do so. Global submits that it is impossible to square this result with the Act and applicable FCC regulations.

B. The First Circuit's concern about the powers vested in state commissions was misplaced.

Referencing § 252(b), the First Circuit determined that Global's position was "inconsistent with the basic arbitral power vested in the state commission." Pet. App. 16a. However, although that section provides state commissions with the powers to carry out arbitrations, it does not empower them to disregard the statutory language contained in the Act. *See* 47 U.S.C. § 252(e)(6). Pet. App. 69a. The simple fact that Congress provided a means by which ILECs and CLECs could arbitrate their disputes does not mean that Congress intended CLECs to have to choose between arbitration and adoption. If Congress had intended such a choice, it would have included language to that effect in the Act. It did not do so. And since it did not do so, its language should be interpreted broadly to effectuate its purpose of providing competition in the local telephone market. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purpose.").

C. The First Circuit's concern about the binding nature of arbitral decisions was misplaced.

The First Circuit determined that Global's position was "inconsistent with the power of state commissions to make their arbitral decisions *binding on both parties*." Pet. App. 16a. (Emphasis in original). Clearly, the Act provides for binding as opposed to nonbinding arbitration as one way for CLECs to obtain interconnection terms with an ILEC. Global does not suggest that Congress intended CLECs and ILECs to attend arbitration for the purpose of obtaining a nonbinding result, with one exception. The

exception is specifically provided in § 252(i). That exception provides CLECs with the right to adopt the terms of another CLEC's interconnection agreement. As stated above, that section does not contain any limitations whatsoever, nor should it.

In order to ensure that state commissions provide a level playing field for CLECs within their jurisdiction, the Act provides two methods for CLECs to ensure they did not obtain inappropriate, nondiscriminatory terms through arbitration. The CLEC may appeal the arbitration decision to the Federal District Court pursuant to the provisions of § 252(e)(6) of the Act, or simply adopt the terms of another interconnection agreement through § 252(i), if one exists. Obviously, given the costly and lengthy nature of the appellate process, the option of adopting the terms of another interconnection agreement is an essential right provided under the Act. This is especially true in light of the changing and dynamic nature of the telecommunications industry, and the challenges facing any competitor of a former monopoly. Congress recognized this by enacting § 252(i) without providing any restrictions to its use.

D. The First Circuit's concern about the statutory duties of good faith and cooperation was misplaced.

Citing § 252(b)(5), the First Circuit found that Global's position "is in conflict with the statutory duties of good faith and cooperation with the commission as arbiter." Pet. App. 18a. It reasoned that "[i]n attempting to void the terms of a valid arbitration order, it is clear that Global NAPs is refusing to cooperate with the DTE, in violation of its duty to negotiate in good faith." Pet. App. 18a. The Court was wrong for two reasons. First, the Arbitration Order has not

been determined valid; it is under appeal. Second, and more important, § 252(b)(5) says nothing about preventing a CLEC from exercising its right to adopt the terms of another interconnection agreement under § 252(i). Rather, it states:

> The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence or with the assistance of the State commission shall be considered a failure to negotiate in good faith.

As can be seen, the section applies only to negotiations between the parties and to the commission's function as arbitrator. It does not apply to, or negate, the rights afforded by § 252(i). If this section were truly to be read as broadly as the First Circuit believes, it also would negate a party's right to appeal the arbitration decision to the district court. Clearly, this section is not fairly read as preventing Global from adopting the Sprint Agreement.

E. The First Circuit's concern about the judicial review provisions of the Act was misplaced.

Citing § 252(e)(6), the First Circuit determined that Global's position "is also inconsistent with the judicial review provisions of the [Act]." Pet. App. 19a. The Court concluded that "[i]f 'any party aggrieved by a determination' feels the arbitral determination is contrary to the [Act], its remedy is through judicial review, not self help." Pet. App. 19a. Section 252(e)(6) states,

> In any case in which a State commission makes a determination under this section, any party

> aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

However, nowhere does this section contain any language that judicial review is the sole remedy for an unfair or erroneous decision by a State commission. It does not mention § 252(i), nor restrict a CLEC's right to adopt the terms of another interconnection agreement. Instead, it states that the aggrieved party "may" appeal to the district court; it does not say that it "must" or that this is its exclusive remedy.

As one commentator noted, litigation is the equivalent of two people placing their heads in a bucket of water and daring the other to outlast them. Congress recognized this when it created § 252(i). It intended that section as a means for CLEC's to pull their heads out of the water short of a full appeal of an arbitrated decision that did not comply with federal law.

F. The First Circuit's reliance on FCC regulations was misplaced.

The First Circuit cited to FCC regulations in support of its decision, but those regulations do not confirm its reasoning. The Court correctly observed that 47 C.F.R. § 51.809(b) provides two express limitations to a CLEC's right to adopt the terms of another interconnection agreement: "1) if [the ILEC] shows that the costs of providing a service will be greater to the requesting competitor than it was to the original negotiating party, or 2) if [the ILEC] shows that the provision of that service is technically infeasible."

Pet. App. 20a. However, as stated above, a review of the DTE order shows that no such showing was made. Therefore, reliance on this regulation was misplaced.

The First Circuit also cited 47 C.F.R. § 51.809(c) in support of its decision. Pet. App. 21a. That regulation provides that interconnection "agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable time after the approved agreement is available for pubic inspection under section 252(h) of the Act." The Court agreed with the DTE's interpretation that once the arbitration was concluded, a reasonable time had expired. Pet. App. 21a. However, this rationale is not driven by time at all; it is driven simply by the procedural status of the arbitration. Neither the Court nor the DTE cited any additional reason justifying their conclusion that the procedural status of the arbitration governed, and eliminated, a CLEC's right to exercise its rights under § 252(i).

CONCLUSION

For the forgoing reasons, Global submits that this Court should grant this petition for writ of certiorari. Because the decision of the First Circuit is in clear and direct conflict with controlling federal statutes and regulations, Global also submits that this case is appropriate for summary disposition pursuant to Sup. Ct. R. 16.1, and requests that the Court summarily reverse the First Circuit Court's decision. *See Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) (summary reversal appropriate to correct lower court's "demonstrably erroneous application of federal law").

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 19, 2005

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 04-1711

GLOBAL NAPS, INC.,

Plaintiff, Appellant,

v.

VERIZON NEW ENGLAND, INC.; MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY; PAUL B. VASINGTON, in his capacity as Commissioner; JAMES CONNELLY, in his capacity as Commissioner; W. ROBERT KEATING, in his capacity as Commissioner; DIEDRE K. MANNING, in her capacity as Commissioner; and EUGENE J. SULLIVAN, in his capacity as Commissioner,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, *U.S. District Juddge*]

Before
Lynch, Lipez, and Howard, *Circuit Judges.*

Appendix A

LYNCH, *Circuit Judge.* This appeal represents one part of a larger dispute between Global NAPs, a competitive local exchange carrier (CLEC), and Verizon New England, Inc., an incumbent local exchange carrier (ILEC), in their attempt to reach an interconnection agreement under the Telecommunications Act of 1996(TCA), Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). The TCA sets up detailed procedures for the creation of interconnection agreements in order to serve the TCA's goal of fostering competition in local telephone markets. Those procedures allow competing carriers to gain access to the incumbent carrier's telecommunications network and facilities and govern the terms and fees of that access.

Global NAPs appeals from the district court's judgment affirming a February 19, 2003 order of the Massachusetts Department of Telecommunications and Energy (DTE), the state commission given the power to arbitrate disputes over interconnection agreements under the TCA. 47 U.S.C. § 252(b). The February 19, 2003 administrative order followed an earlier December 12, 2002 DTE order deciding the arbitration between Verizon and Global NAPs. That arbitration had been initiated by Global NAPs after a period of negotiation with Verizon failed to produce an agreement on all issues.

The challenged February 19 order allowed a remedial motion by Verizon to force Global NAPs to sign an interconnection agreement consistent with the terms of the DTE's earlier December 12 arbitration order. Verizon brought this motion because Global NAPs had balked at the December

12 arbitration order, said it was not bound by the result of the arbitration, and that it was instead exercising what it thought was its unconditional right under § 252(i) of the Act to adopt the terms of an interconnection agreement Verizon had with Sprint, which preexisted Global NAPs' arbitration request.

The merits of the underlying December arbitration order from the DTE are not before us. The merits issue before us is whether in its February order the DTE acted in violation of § 252(i) of the TCA in precluding Global NAPs from nullifying and avoiding the effect of the arbitration—which binds Global NAPs and Verizon to an agreement—by instead opting into the terms of an older agreement Verizon had signed with Sprint. If Global NAPs were free to so opt in, that would moot the challenge to the underlying December arbitration order. We find that the DTE's February 19 order was not in violation of the TCA and affirm the district court.

I.

Before the passage of the TCA, local telephone service was provided mainly by state-regulated monopolies, such as Verizon. These monopolies, the ILECs, owned all networks and facilities (including telephone lines, poles, trunks, etc.) attendant to the provision of local telephone service. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). A purpose of the TCA was to end the local telephone monopolies and create a national telecommunications policy that strongly favored competition in local telephone markets. *See P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R.*, 189 F.3d 1, 7 (1st Cir.1999).

Appendix A

Section 251 of the TCA imposes obligations on both competing carriers and incumbent carriers. Section 251(a)(1) imposes a duty on all carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). The TCA imposes on an incumbent carrier more stringent duties, including "the duty to permit other carriers to interconnect with its facilities, to provide other carriers with access to elements of its local network on an 'unbundled' basis, to sell to other carriers at wholesale prices the services that it provides to its customers, and to negotiate interconnection agreements in good faith." *P.R. Tel. Co.*, 189 F.3d at 8; *see* 47 U.S.C. § 251(c).

Section 252 provides the procedures for the creation of interconnection agreements.[1] Interconnection agreements govern the terms and conditions by which CLECs may gain access to the ILECs' local telephone network and facilities, thus allowing the CLECs to provide competing local telephone service. Incumbents and competitors may negotiate freely an interconnection agreement, and both parties have a duty to negotiate in good faith. 47 U.S.C. § 251(c)(1). If the parties reach an agreement through negotiation, that agreement need not satisfy the substantive requirements of §§ 251(b) and (c). *Id.* § 252(a)(1). If after a period of

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1. In addition to pursuing an interconnection agreement, a competitor may also seek access to the incumbent's network by purchasing local telephone services at wholesale rates for resale to end users or by leasing elements of the incumbent's network on an "unbundled basis." 47 U.S.C. § 251(c); *U.S. West Communication, Inc. v. Sprint Communications Co.*, 275 F.3d 1241, 1244 (10th Cir.2002).

negotiation the parties are not able to come to an agreement on some issues, either party may petition a state commission to decide those open issues in arbitration. *Id.* § 252(b)(1). The commission then has the authority to decide the open issues between the parties, and to impose conditions on the parties for the implementation of the terms of arbitration into an agreement. *Id.* § 252(b)(4)(C). In deciding those issues, the commission must "ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [Federal Communications Commission] pursuant to section 251." *Id.* § 252(c)(1). Further, either party's refusal to negotiate or to cooperate with the state commission acting as arbitrator constitutes a breach of its duty to negotiate in good faith. *Id.* § 252(b)(5).

In addition, the TCA requires ILECs to allow any requesting CLEC to adopt the terms and conditions of any interconnection agreement it has with any other CLEC, provided that agreement has been approved by the requisite state telecommunications commission. *Id.* § 252(i).

Once a negotiated or arbitrated agreement is completed, it must be submitted to the state commission for approval. *Id.* § 252(e)(1). The commission may reject any negotiated agreement if it discriminates against a third party carrier or if its implementation is "not consistent with the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A). The commission may reject an arbitrated agreement if it fails to meet the substantive requirements of § 251, including the FCC's implementing regulations, or the pricing standards set forth in § 252(d). *Id.* § 252(e)(2)(B). That commission decision is subject to federal judicial review:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Id. § 252(e)(6).

Verizon and Global NAPs began the negotiation process for a new interconnection agreement in early 2002, because their previous agreement was approaching expiration. On July 30, 2002, Global NAPs filed a petition with the DTE to arbitrate several issues on which the parties could not agree. The DTE issued an order on December 12, 2002, resolving all open issues and ordering the parties to incorporate the arbitrated terms into an agreement and file that agreement with the DTE within 21 days, or by January 2, 2003. The DTE allowed the parties' joint motion for extension of time to file the agreement until January 17, 2003.

On December 30, 2002, Global NAPs brought an action in federal district court challenging the merits of the DTE's arbitration determination.[2] The merits of that December 12, 2002 DTE order are not before us.

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2. The most important contested issue in that arbitration between the parties relates to the reciprocal compensation requirements between ILECs and CLECs for toll-free calls placed by the ILEC's customers to a CLEC's internet service provider (ISP) customers. This issue has prompted much litigation, including issues concerning the validity of FCC rulings on the issue. *See, e.g., WorldCom, Inc. v. FCC,* 288 F.3d 429 (D.C.Cir.2002).

Appendix A

On January 9, 2003, Global NAPs informed Verizon that, rather than entering into the agreement embodying the DTE's arbitration decision, it would seek to adopt the terms of a preexisting December 19, 2001 agreement Verizon had with Sprint ("Sprint agreement"). Global NAPs contended that it has an unconditional right to do so pursuant to 8 U.S.C. § 252(i). Global NAPs said its adoption of the preexisting Sprint agreement was consistent with the arbitration order, under which Global NAPs retained its § 252(i) rights.

On January 16, 2003, Global NAPs informed the DTE of its intention to opt into the Sprint agreement, in place of the arbitrated agreement. In response, on January 17, 2003, Verizon filed a motion with the DTE to approve the arbitration order, seeking, in essence, to force Global NAPs to execute an agreement consistent with the arbitration order, or alternatively, should the DTE allow Global NAPs to opt into the Sprint agreement, to order that the "agreement be modified to reflect the [DTE]'s legal and policy determinations set forth in the Arbitration Order."

On February 19, 2003, the DTE granted the initial portion of Verizon's motion and ordered the parties to sign and file an agreement consistent with the initial arbitration order. That February 19, 2003 order is the subject of this appeal. All parties agree that this order left Global NAPs free to challenge the substance of the December 12, 2002 arbitration order.

In the February 19 order, the DTE rejected Global NAPs' claim that it retained the unconditional right to opt into the Sprint Agreement even after the DTE issued its arbitration order. The DTE first held that a final arbitration order

pursuant to § 252(b) is binding on both parties,[3] noting that it had always required that arbitration be binding on both parties. It held that its rule that arbitrations be binding on both parties was consistent with FCC regulation. *See* 47 C.F.R. § 51.807(h). Further, the DTE noted that the FCC's Local Competition Order, which embodies the FCC's initial post-enactment interpretation of the statute, stated that the states may consider the FCC's rules when implementing their own standards for arbitration. *See* Local Competition Order, 11 F.C.C.R. 15499, 16127 (1996).

Further, the DTE held that since the arbitration order directed the parties to file an agreement containing the arbitrated terms, and provided no alternatives, Global NAPs' attempt to opt into the Sprint agreement was in violation of that earlier order. The DTE held that "[t]he § 252(i) adoption process permits a CLEC, during the negotiation process, to opt into another carrier's contract, not to do so after a decision has been reached through arbitration."

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3. The DTE also rejected Global NAPs' claim that when the FCC stated, in the Local Competition Order ¶ 1293, that "competing providers do not have an affirmative duty to enter into agreements under section 252," the FCC meant that CLECs were not bound by the results of an state arbitration under § 252(b). Local Competition Order, 11 F.C.C.R. 15499, 16131 (1996). Rather, the DTE held that a fuller reading of the TCA and FCC rules shows that this paragraph stood for the narrower proposition that competing carriers, unlike incumbents, cannot be forced to enter into an interconnection agreement, but rather can purchase services directly through the incumbent's tariff. The DTE held that it does not mean that CLECs can avoid the terms of a valid arbitration order.

It also noted that Global NAPs' interpretation of the TCA was contrary to public policy, as it would allow carriers to "game the system" by always attempting to arbitrate, and if unhappy with the results, merely to opt into an existing agreement.[4] The DTE ordered the parties to file an agreement consistent with the initial arbitration order within seven days. The parties signed and entered an agreement consistent with the court's ruling, under Global NAPs' protest. The DTE did not, contrary to Global NAPs' assertion, hold that a party to an arbitrated agreement can never exercise rights under § 252(i). It also did not, contrary to Verizon's assertion, hold that a party subject to a valid arbitration order could never, under § 252(i), take advantage of terms in a previously available agreement.

On March 6, 2003, Global NAPs filed a second action in district court, this time challenging the DTE's February 19 order.

On March 11, 2003, all parties to the second litigation (Global NAPs, Verizon, and the DTE) filed a joint motion to consolidate Global NAPs' two actions. In that motion, the parties proposed that the district court rule on Global NAPs' challenge of the DTE's February 19 order—whether Global NAPs is permitted to opt into the Sprint Agreement—prior to ruling on its challenge to the DTE's underlying arbitration

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4. The DTE reasoned that competing carriers would have no incentive to negotiate and would always seek arbitration, because the ability to opt into an existing agreement post-arbitration would mean that such competitors could only benefit and never be made worse off by arbitration. That would waste the DTE's limited resources and be unduly burdensome to incumbents.

order—the merits of the arbitration agreement. The district court granted the motion and accepted the parties' briefing schedule, under which the parties filed cross motions for summary judgment in the first action on the issue whether § 252(i) would permit Global NAPs to opt into the Sprint agreement despite the existence of the DTE's arbitration order to the contrary. The district court granted Verizon's and the DTE's motions for summary judgment, and denied Global NAPs' motion. Global NAPs timely appealed.

II.

Appellate Jurisdiction

The parties agree the federal courts have subject matter jurisdiction to review state agency determinations under the TCA for compliance with federal law, pursuant to 28 U.S.C. § 1331. *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002). *See also*, 47 U.S.C. § 252(e)(6).

Verizon initially argues that this court lacks appellate jurisdiction to hear Global NAPs' appeal due to (1) the lack of a final judgment under 28 U.S.C. § 1291 and (2) lack of standing in Global NAPs. The DTE does not join Verizon in arguing lack of appellate jurisdiction or lack of standing, but briefs the case on the merits.

Verizon argues that the district court's ruling was not a final judgment because Global NAPs' two actions were consolidated, thus rendering them one case, and the grant of summary judgment disposed of only one of the two consolidated cases. This argument is without merit. The

disposition of one case in a consolidated action is a final and appealable judgment unless the cases were consolidated "for all purposes." *See Bay State HMO Management, Inc. v. Tingley Sys., Inc.*, 181 F.3d 174, 178 n. 3 (1st Cir.1999). In moving to consolidate these cases, the parties expressly requested that the district court review the February 12, 2003 DTE order before proceeding with its review of the December 12, 2002 order, and the district court agreed to do so.[5] Review of the merits of the December 12, 2002 arbitration order was, in essence, stayed pending the court's determination of the challenge to the second DTE order; the parties proposed completely separate briefing schedules for the review of the two consolidated cases. Verizon's claim that the cases were consolidated "for all purposes" is wrong and Verizon's last minute assertion is inconsistent with how it presented its case in the trial court.

These circumstances bring the case squarely within the bounds of *In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir.1972). There, this court determined that the claims in a consolidated action remained separate, and therefore a Rule 54(b) determination was not required for appellate jurisdiction to be proper, because "[e]xcept for the consolidation of the[ ] cases for the convenience of pre-trial and trial procedure, the cases maintained their separate identities throughout the litigation. Separate judgments were entered in each of the five cases." *Id.* at 441. We found this to be consistent with the theory behind consolidation, which

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5. Further, we note that Verizon did not move to challenge jurisdiction upon the filing of Global NAPs' appeal, waiting instead until the filing of its brief to do so.

was a procedural mechanism meant to serve the purposes of judicial economy and convenience of the parties, as here, but not to alter the substantial rights the parties had in the separate actions.[6] *Id.*

Verizon relies on a notation in the district court docket from the clerk of court that the second complaint, i.e. the present case, was consolidated "for all future proceedings," and that this removes it from the *Massachusetts Helicopter* rule. *See Bay State HMO Management, Inc., v. Tingley Sys., Inc.*, 181 F.3d 174, 178 n. 3. The reality of the situation is that the consolidation was for purposes of convenience and efficiency.

Verizon also urges us to overrule *Massachusetts Helicopter* in favor of the Ninth Circuit rule in *Huene v. United States*, 743 F.2d 703, 705 (9th Cir.1984), also followed in *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir.1987) and *Spraytex, Inc. v. DJS&T, Homax Corp.*, 96 F.3d 1377, 1382 (Fed.Cir.1996). The advantage, it says, of the Ninth Circuit rule is that it provides a bright line—no ruling in a consolidated case may be appealed until there is an ultimate final judgment on all matters. That is true. The disadvantage of the rule is that it may cause injustice on particular facts, and the rule acts as a disincentive which may prevent consolidation for purely pragmatic reasons of convenience and efficiency.

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6. Verizon's attempt to characterize the district court's order as a grant of partial summary judgment is in error. There is nothing in the district court's memorandum or judgment that suggests it was a grant of partial summary judgment.

In any event, our adherence to the *Massachusetts Helicopter* rule was reaffirmed more recently in *Bay State HMO Management,* 181 F.3d at 178 n. 3. As a panel, we are not free to overrule circuit precedent. The district court's grant of summary judgment is a final order within the meaning of 28 U.S.C. § 1291.

Verizon's challenge to Global NAPs' standing to pursue an appeal is also without merit. Verizon's claim of lack of standing seems to be predicated on the notion that, if Global NAPs is allowed to opt into the Sprint agreement, the DTE will construe the Sprint agreement in a manner consistent with the terms of the arbitration order, and thus Global NAPs will be no better off.

Global NAPs disagrees, and recites injury to itself. Further, Verizon's position is contrary to its position below in several respects. Among them is that Verizon requested from the DTE that, should the DTE allow Global NAPs to adopt the Sprint agreement, then the agreement be modified to adopt legal and policy determinations made in the arbitration order. If the Sprint agreement were not materially different from the challenged agreement, such modification would not be necessary. Indeed, Global NAPs would not be trying to join the Sprint agreement. Further, the possibility that the DTE *might* construe the Sprint agreement consistently with the December 12 arbitration order, and that doing so would be upheld against a likely challenge, is insufficient to render Global NAPs without standing in this case. We reject the lack of standing argument.

Appendix A

III.

Interpretation of the TCA § 252(i)

The precise legal question under review is narrow, though one of first impression in the circuit courts of appeals: does a competing carrier have an unconditional right, under § 252(i) of the TCA, to avoid the terms of a final arbitration order from a state telecommunications commission, adjudicating a dispute between the CLEC and ILEC, by seeking to opt into the terms of a previous interconnection agreement that the ILEC has with another CLEC? This is an issue of federal statutory interpretation of the TCA.[7] We agree with the DTE and the district court that the TCA grants no such right.

Standard of Review

This circuit has not previously articulated precisely the standard of judicial review of state agency determinations under the TCA. Issues of law, as here, are subject to de novo review, *P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R.*, 189 F.3d 1, 7 (1st Cir.1999), and we apply that standard to state agency determinations under the TCA.[8]

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7. Since the FCC, and not the individual state commissions, is the agency with the power granted by Congress to administer the TCA, through the formulation of policy, rulemaking, and regulation, we do not afford deference to the DTE's interpretation of the statute under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

8. Each of the Circuits that has addressed the standard of review under the TCA has held that where the state agency determination

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Appendix A

In interpreting a statute, we begin with the text. *BedRoc Ltd. v. United States,* 124 S.Ct. 1587, 1593 (2004). Section 252(i) states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. § 252(i). In urging the court to hold that § 252(i) gives it an unconditional right to avoid the terms of an arbitration order and opt into a previously available

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rests principally on an interpretation of the TCA, de novo review is applied. *See, e.g., Ind. Bell Tel. Co. v. McCarty,* 362 F.3d 378, 383 (7th Cir.2004); *MCIMetro Access Transmission Servs. v. Bellsouth Telecomms., Inc.,* 352 F.3d 872, 876 (4th Cir.2003); *Coserv. Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.,* 350 F.3d 482, 486 (5th Cir.2003); *U.S. West Communications, Inc. v. Sprint Communications Co.,* 275 F.3d 1241, 1248 (10th Cir.2002); *AT & T Communications of S. States, Inc. v. BellSouth Telecomm., Inc.,* 268 F.3d 1294, 1296 (11th Cir.2001); *AT&T Communications of N.J. v. Verizon N.J., Inc.,* 270 F.3d 162, 169 (3d Cir.2001); *U.S. West Communications., Inc. v. MFS Intelenet, Inc.* 193 F.3d 1112, 1117 (9th Cir.1999). Further, other Circuits have held that where no error of law exists, the state agency's other determinations are reviewed under the arbitrary and capricious standard. *See, e.g., MCI Telecomms. Corp. v. Ohio Bell Tel. Co.,* 376 F.3d 539, 548 (6th Cir.2004); *U.S. West Communications, Inc.,* 275 F.3d at 1248; *Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.,* 221 F.3d 812, 816 (5th Cir.2000); *MFS Intelenet,* 193 F.3d at 1117.

agreement, Global NAPs points out that the text of § 252(i) does not state expressly when and under what circumstances the incumbent must make interconnection agreements available to other competitors. From this silence, Global NAPs argues it is free to opt in at any time it chooses. But § 252(i) does not expressly state what Global NAPs reads it to mean either. At best, § 252(i) is ambiguous on the subject, if that section is read alone. The absence of an express statement in § 252(i) does not end the matter; the section must be read in light of the structure and intent of the statute.

Global NAPs' broad reading of § 252(i) is incorrect, because that reading brings § 252(i), under the circumstances of this case, into direct conflict with, and in important aspects negates, several other sections of the TCA.

Global NAPs' reading is inconsistent with the basic arbitral power vested in the state commission. Section 252(b), entitled "Agreements arrived at through compulsory arbitration," allows for either party to an interconnection agreement to petition a state commission for arbitration of open issues, and grants powers to the state commission to carry out the arbitration. *Id.* § 252(b).

Global NAPs' reading is also inconsistent with the power of state commissions to make their arbitral decisions *binding on both parties*. Section 252(b)(4)(C) requires the state commission to "resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement." *Id.* § 252(b)(4)(C). In turn, subsection (c), among other things, states that "a State commission shall . . . provide a schedule for implementation

of the terms and conditions by the parties to the agreement." *Id.* § 252(c). By allowing the commission acting as arbitrator to place conditions on *both* parties for the implementation of interconnection agreements, it is clear that § 252(b)(4)(C) intends for arbitration orders to be binding on both parties.

Global NAPs responds that arbitration orders are not binding because generally under the TCA, the obligations on CLECs are not equal to or reciprocal with those on ILECs and so arbitration decisions are equally asymmetrical in their results. Global NAPs also makes a broader argument that the FCC's regulations, and the TCA generally, create asymmetrical rights and obligations on competitors and incumbents, and those greatly tip the scale in favor of competitors. It argues that under § 252 incumbents are required to enter into interconnection agreements, but competitors are not. Thus Global NAPs argues that, to the extent there is ambiguity as to the scope of § 252(i), it should be construed broadly in favor of competitors and against the incumbent, consistent with the asymmetry created by the statute and regulations as a whole.

This argument, however, ignores the important fact that § 252(b) is *not* one of the areas of the TCA that creates asymmetrical obligations on the parties. Section 252(b)(1) allows either party to the negotiation to petition for arbitration. Section 252(b)(4) allows the state commission to impose conditions on both parties in order to carry out the arbitration. And § 252(b)(5) creates a duty for both parties to cooperate with the arbitration at the risk of breaching the duty both parties have, under § 252(a), to negotiate in good faith. There is no basis for Global NAPs' reading § 252(i) as

somehow turning the parallel obligations that run throughout § 252(b) into merely one-way obligations.

Further, Global NAPs' reading is in conflict with the statutory duties of good faith and cooperation with the commission as arbitrator. The TCA, at § 252(b)(5), states:

> The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

Id. § 252(b)(5). In attempting to void the terms of a valid arbitration order, it is clear that Global NAPs is refusing to cooperate with the DTE, in violation of its duty to negotiate in good faith.[9]

Global NAPs responds by asking the court to read an implicit limitation on the good faith requirement of § 252(b)(5)—that CLECs are not bound by the terms of § 252(b)(5) if they attempt to opt into a previously available contract. Global NAPs says that this is the effect of § 252(i). But § 252(i) says nothing of the sort. Rather, it is written in terms of an obligation on the part of ILECs to make

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9. The record is clear that the DTE did not consider its order to be a penalty. Rather, the DTE held that § 252(i) could not be read to allow Global NAPs to void the terms of the binding arbitration order by opting into an agreement available to them throughout the entire period of negotiation and arbitration.

agreements available to potential CLECs, not as an unconditional right on the part of CLECs to modify their clear obligations under earlier subsections of § 252. We read the sections consistently, and conclude that § 252(i) is not an implicit limit on the binding effect of the arbitration provisions of § 252(b)(5). In this context, there is nothing ambiguous about the terms of § 252(b)(4)(C) and (b)(5).

Global NAPs' argument is also inconsistent with the judicial review provisions in the TCA, for determinations made by a state commission:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). If "any party aggrieved by a determination" feels the arbitral determination is contrary to the TCA, its remedy is through judicial review, not self-help.

In addition to our reading of the statutory sections, there is another source of law to consider: FCC regulations interpreting the statutory sections at issue, albeit on different points. The FCC's interpretation is relevant in two senses. First, under § 252(c)(1), the DTE itself must "ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251." *Id.* § 252(c)(1). Second, to the extent there is ambiguity in the statute, present

here in § 252(i) but not in § 252(b)(4)(C) and (b)(5), deference is due to the FCC's reasonable interpretation. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).[10]

The FCC has not interpreted the statute on the precise question before us. That is not surprising, since the issue is one of the power of a state commission. The TCA is an interwoven whole and the FCC's interpretation of related strands of the weaving is relevant, at least by analogy.

Both sides cite to the FCC's regulation interpreting § 252(i), found at 47 C.F.R. § 51.809, in support of their interpretation of the statute. The regulation, 47 C.F.R. § 51.809(b), provides two express limitations to a CLEC's opt in rights under § 252(i): an incumbent need not make available the terms of an interconnection agreement to a particular competitor 1) if it shows that the costs of providing a service will be greater to the requesting competitor than it was to the original negotiating party, or 2) if it shows that the provision of that service is technically infeasible. 47 C.F.R. § 51.809(b). In addition, there is a third limitation: 47 C.F.R. § 51.809(c) states that incumbents must make terms of interconnection agreements available to other competitors only "for a reasonable time" after their approval by the state commission.

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10. The FCC is explicitly granted rulemaking authority under the TCA, 47 U.S.C. § 201(b), and the Supreme Court has held that this includes rulemaking power for §§ 251 and 252, without being limited to interstate and foreign matters. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

Appendix A

The FCC regulation 47 C.F.R. § 51.809 itself rejects Global NAPs' premise that § 252(i) grants an unconditional right to CLECs to adopt the terms of any interconnection agreement the ILEC has with another CLEC. The obligation of ILECs to make those agreements available to other CLECs is itself subject to conditions: comparable-cost, technical-feasibility, and the reasonable-time restrictions are three such conditions contemplated by the regulation.[11]

The reasonable-time requirement under 47 C.F.R. § 51.809(c) is particularly relevant. Here, after all, the DTE has said it might have reached a different outcome if, during the pendency of an arbitration, Global NAPs had sought to withdraw its request for arbitration in favor of exercising whatever opt in rights it had. The DTE held only that once it had concluded its arbitration and issued its order, Global NAPs was not free to enter into an opt in agreement in lieu of accepting arbitrated terms and incorporating them into its agreement. The DTE's position is entirely consistent with the FCC regulation's reasonable-time requirement.

We also consider the parties' arguments based on the FCC's Local Competition Order, which embodies the FCC's initial interpretative rulemaking implementing the TCA after its passage in 1996, as support for its interpretation of the statute. *See* 11 F.C.C.R. 15499 (1996). Global NAPs attempts to argue that while FCC arbitrations are binding on both

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11. The reasoning provided for our reading of the statute above, consistent with the entirety of § 252, adequately dispels Global NAPs' argument that the limitations on § 252(i) promulgated by the FCC in § 51.809 are the *only* permissible limitations that could apply to that subsection.

parties, 47 C.F.R. § 51.807(h), the Local Competition Order demonstrates that arbitrations before state agencies under § 252(b) are only binding on incumbents. It makes a sort of negative pregnant argument from the FCC's Local Competition Order ¶ 1293, which states:

> Absent mutual agreement to different terms, the decision reached through arbitration is binding. We conclude that it would be inconsistent with the 1996 Act to ... permit incumbent LECs to not be bound by an arbitrated determination. We also believe that, although competing carriers do not have an affirmative duty to enter into agreements under section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith.

11 F.C.C.R. at 16131. Global NAPs contends that this renders the arbitration provision a one-way ratchet: incumbents are bound by the arbitration decision, but competitors are not. We disagree. The Order does not say that competitors are not required to accept the terms of an arbitration order. Rather it says that competitors are not required "to enter into agreements under section 252," and this is clearly correct. The law mandates that an incumbent must enter into an interconnection agreement under the requisite conditions, and the competitor need not enter into an agreement even if the incumbent so desires. It says nothing about the obligations of a competitor that is subject to the terms of a binding arbitration order.

Significantly, the Local Competition Order does not state that competitors have a right to use § 251(i) to avoid their obligations under a binding arbitration order. Properly read the Order refers to the admitted binding effect in FCC arbitrations, but says nothing about state arbitrations. Further, the FCC regulation's explicit statement of the binding effect on both parties supports the DTE's position. *See* 47 C.F.R. § 51.807(h).

Global NAPs then makes another argument based on lack of symmetry as to most favored nation clauses. Global NAPs cites to Local Competition Order ¶ 1316, as well as the Tenth Circuit's decision in *U.S. West Communications, Inc. v. Sprint Communications Co.*, 275 F.3d 1241 (10th Cir.2002), to support its interpretation of § 252(i). Neither is helpful to Global NAPs' position. Paragraph 1316 of the Local Competition Order states:

> We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) . . . means that any requesting carrier may avail itself of more advantageous terms and conditions *subsequently* negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission.

11 F.C.C.R. at 16139-40, 1996 WL 452885 (emphasis added).

Paragraph 1316's "most favored nation" language deals with an issue not presented here: the ability of a party to an existing interconnection agreement to adopt the terms of another carrier's agreement that is *subsequently* approved by a state commission. The DTE's decision said nothing about Global NAPs' § 252(i) rights to adopt terms in subsequently approved agreements, nor does our decision here do so.

Global NAPs' reliance on *U.S. West* suffers from a similar problem. The question that court faced was whether the state commission acting as arbitrator properly interpreted § 252(i) to allow a competitor to amend its interconnection agreement to take advantage of an incumbent's tariffs, as opposed merely to an element in another competitors' approved interconnection agreement, that are more favorable than the prices in its agreement. *U.S. West,* 275 F.3d at 1249. The case did not say that a CLEC subject to a binding arbitration order can use § 252(i) to avoid the terms of that order and adopt completely the terms of a previously available agreement.

Global NAPs makes a final, policy-based argument that reading § 252(i) to prevent it from opting into the Sprint agreement post-arbitration is both anti-competitive and discriminatory, and thus at odds with the purpose of the TCA. If what Global NAPs alleges were true, namely that the terms of the underlying arbitration order are either contrary to law or unduly burdensome on Global NAPs (or both), the statute provides Global NAPs with a remedy—direct review of the terms of the arbitration order in district court. 47 U.S.C. § 252(e)(6). This is the remedy Congress provided.

Accordingly, we ***affirm.*** Costs are awarded to Verizon.

APPENDIX B — MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED MAY 12, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-10437-RWZ-11
CONSOLIDATED WITH 02-12489-RWZ-44

GLOBAL NAPS, INC.

v.

VERIZON NEW ENGLAND INC. d/b/a VERIZON MASSACHUSETTS, et al.

MEMORANDUM OF DECISION

May 12, 2004

ZOBEL, D.J.

Until the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 101, *et seq.*, was passed, local telephone service was provided by one company throughout a given region. The Act promotes competition by encouraging and facilitating the entry of new telecommunications carriers into local service markets. It requires incumbent local exchange carriers ("ILECs") to share their networks with competing local exchange carriers ("CLECs") upon request, and to negotiate interconnection agreements in good faith. An entering CLEC can choose to opt into an existing

agreement between an ILEC and a CLEC, or it can negotiate its own agreement with the ILEC. 47 U.S.C. § 252(i), § 251(a)(1). Where negotiation is unsuccessful, either party may request that a state commission arbitrate the disputed terms. 47 U.S.C. § 252(a)(2) and (b). The negotiated or arbitrated agreement must then be submitted to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission may reject the agreement only if it fails to satisfy 47 U.S.C. §§ 251 and 252(d). 47 U.S.C. § 252(e)(2).

Global NAPS, Inc. ("Global"), a CLEC, entered into negotiations with Verizon New England, Inc. ("Verizon") concerning the terms of an interconnection agreement. On July 30, 2002, Global petitioned the Massachusetts Department of Telecommunications and Energy ("DTE") for arbitration of the disputed terms. On December 12, 2002, DTE ordered the parties to incorporate its findings into a final interconnection agreement to be filed with DTE within 21 days, or by January 2, 2003. Both parties, thereafter, moved to extend the time to finalize the language of the agreement.

On December 30, 2002, Global filed suit in this Court against Verizon, DTE, and various commissioners, seeking a declaration that DTE's December 12, 2002. arbitration order is unlawful and enjoining defendants from enforcing it (Civil Action No. 02-12489-RWZ). A few weeks later, Global informed DTE that it would adopt the terms of another interconnection agreement between Verizon and Sprint Communications L.P. ("Sprint Agreement"), which existed before Global entered into the arbitration, instead of finalizing the arbitrated agreement. The next day, Verizon

filed a Motion for Approval of Final Arbitration Agreement or, in the Alternative, for Clarification, in the DTE proceeding. Global opposed.

On February 19, 2003, DTE rejected Global's proposal absent Verizon's consent. DTE determined that 47 U.S.C. § 252(i) does not allow a CLEC to avoid an arbitrated agreement by opting into a more favorable agreement for the following reasons: (1) DTE's arbitrated decisions are final and binding on both parties, and (2) public policy dictates the arbitrated agreement be upheld to provide incentive for the CLECs to negotiate in good faith and to conserve administrative resources. With specific reference to this case, it determined that the incorporation of Section 252(i) into the arbitrated agreement does not allow Global to opt into another agreement at any time. DTE approved Verizon's agreement, which incorporated the terms of the arbitration, and directed the parties to sign the approved arbitration agreement within seven days.

Global then filed the present suit on March 6, 2003, against Verizon, DTE and various commissioners, contesting DTE's February 19, 2003, order. More specifically, Global seeks to set aside the order and opt into the Sprint Agreement. This action was consolidated with Civil Action No. 02-12489-RWZ. All parties have moved for summary judgment. Global contends that DTE erred by insisting on the finality of its arbitration award and in its interpretation of the Act. Both Verizon and DTE argue that the February 19, 2003 order is entirely consistent with the Act. The parties agree that jurisdiction is proper under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331.

Appendix B

Global asserts that under 47 U.S.C. § 252(i), it has a right to adopt the Sprint Agreement at any time. That section provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

On its face, Section 252(i) says nothing about temporal limits or the inability of a CLEC to adopt a pre-existing agreement instead of an arbitrated one. However, 47 C.F.R. §51.809(c) provides that individual interconnection arrangements shall remain available to CLECs "for a reasonable period of time after the approved agreement is available for public inspection." Global protests that DTE did not rely on the passage of a reasonable period of time, and it is not clear that the time had, in fact, run The argument mixes apples and oranges. DTE clearly held that Global's choice was curtailed not by the expiration of time, but by its decision to arbitrate:

> As Verizon points out, the Sprint Agreement was available to [Global] for adoption before [Global] filed its petition for arbitration and, at any point prior to the issuance of our final Arbitration Order, [Global] could have chosen to adopt the Sprint Agreement. But once our final Arbitration Order was issued, the adoption process under § 252(i)

> was not a lawful option in order to comply with the arbitrated decision.

(Global's Appendix Tab 1 at 13-14). That is a reasonable and correct interpretation of the statute. *See Southern New England Telephone Co. v. Conn. Dept. of Public Utility Co.*, 285 F. Supp. 2d 252, 254 (D. Conn. 2003) ("An entering CLEC can either opt into an existing interconnection agreement between the [incumbent] LEC and another CLEC, or it can negotiate [and arbitrate] its own interconnection agreement.") (emphasis added).

Global further attacks DTE's strict insistence that a CLEC's choice of one process forecloses another one. It contends that "[b]oth by its terms and its intended effect, Section 252(i) assures that regardless of the outcome of any particular negotiation or arbitration, all CLECs remain on equal footing." (Global Mem. at 15). Therefore, Global concludes that under § 252(i), "if an arbitration results in unfavorable terms for the arbitrating CLEC, it can adopt its competitor's terms." (Global Reply at 9). Global's interpretation of the terms and the intended effect of Section 252(i) is far too broad. Section 252(i) does not guarantee that all CLECs will obtain comparable terms in their interconnection agreements; that purported goal is inconsistent with the goal of the Act, which is to promote competition among the carriers. Section 252(i) merely provides CLECs with the opportunity to opt into an existing agreement - an opportunity that Global did not take.

Global next asserts that Section 252(i) allows a CLEC to amend its interconnection agreement to include the more

favorable terms of another agreement. However, it fails to note that it is not a party to the other agreement and cannot, therefore, force an amendment thereto. Instead, Global is attempting to avoid the agreement it arbitrated by opting into another one an altogether different proposition, which is not discussed in the language of Section 252(i).[1]

Global also states that a CLEC, unlike an ILEC, is not obligated to accept the arbitrated agreement. In this it is supported by the asymmetrical nature of the Act which imposes obligations on the ILECs only. However, both Global and Verizon cite to the Federal Communications Commission's ("FCC") Local Competition Order, which states that:

> We reject SBC's suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding. . . . We also believe that, although competing providers do not have an affirmative duty to enter into agreements under Section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith. Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to expand [sic] resources in arbitration if the requesting carrier does not intend to abide by the arbitrated decision.

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1. Because Global is not a party to the arbitrated agreement, there is no need to address DTE's statement concerning Global's inability to void an existing contract in favor of a better contract.

(Global's Appendix Tab 4 at ¶ 1293). The FCC clearly states that the arbitration order is binding on both parties. Furthermore, under Section 252(b)(5), Global's refusal to cooperate with the arbitrator's order constitutes a failure to negotiate in good faith. *See* 47 U.S.C. § 252(b)(5) ("The refusal of any other party to the negotiation. to cooperate with the State commission in carrying out its function as an arbitrator . . . shall be considered a failure to negotiate in good faith."). Therefore, enforcement of the arbitration order is an entirely appropriate penalty and serves as a disincentive for a CLEC to force an ILEC to arbitrate an agreement while reserving the right to withdraw if it does not like the outcome.

Finally, DTE correctly ruled that permitting Global to ignore its arbitration decision would waste DTE's limited resources and impose an unnecessary burden on Verizon. Global asserts that resources would be saved by allowing it to adopt the Sprint Agreement now instead of having to appeal the arbitration order. However, DTE has already expended resources with the arbitration. Global's statement that "[r]esources are not wasted in arbitration even though some of the contract terms established through arbitration may never be used" is completely untenable (Global Reply at 9). Global's final argument that "there is no realistic basis for any concern that CLECs will waste DTE and Verizon resources with unnecessary arbitrations" is belied by this very suit. (Global Mem. at 20). Insofar as Global is contending that the arbitration order is discriminatory, it has a remedy in the suit concerning the merits of the order.

Accordingly, Global's Motion for Summary Judgment is DENIED and the motions by Verizon and DTE are ALLOWED.

May 12, 2004

s/ Rya W. Zobel
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY ON VERIZON NEW ENGLAND. INC. D/B/A VERIZON MASSACHUSETTS' MOTION FOR APPROVAL OF FINAL ARBITRATION AGREEMENT OR, IN THE ALTERNATIVE FOR CLARIFICATION DATED FEBRUARY 19, 2003

THE COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 02-45 February 19, 2003

Petition of Global NAPs, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration to establish an interconnection agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts.

ORDER ON VERIZON NEW ENGLAND, INC. d/b/a VERIZON MASSACHUSETTS' MOTION FOR APPROVAL OF FINAL ARBITRATION AGREEMENT OR, IN THE ALTERNATIVE, FOR CLARIFICATION

I. *INTRODUCTION*

Pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act"),[1] the Department of Telecommunications and

1. Section 252(b) of the Act permits a carrier to petition a state commission to arbitrate any issues left unresolved after voluntary negotiations between the carriers have occurred. 47 U.S.C. §252(b)(1).

Energy ("Department") issued on December 12, 2002 its Arbitration Order ("Arbitration Order") making findings necessary to finalize an interconnection agreement between Global NAPS, Inc. ("GNAPs") and Verizon New England, Inc. d/b/a Verizon-Massachusetts ("Verizon") (collectively, "Parties"). In its Arbitration Order, at 77, the Department directed the Parties to incorporate its findings into a final interconnection agreement "setting forth both the negotiated terms and arbitrated terms and conditions, to be filed with the Department pursuant to § 252(e)(1) of the Act, within 21 days," or by January 2, 2003. On December 19, 2002, the Parties jointly moved the Department to extend the compliance filing deadline to January 17, 2003. The Department granted the Parties' extension request on December 23, 2002.

On January 16, 2003, GNAPs informed the Department that, pursuant to § 251(i) of the Act,[2] it intended to opt-into another contract, namely to adopt the terms of the contract between Verizon and Sprint Communications Company, L.P ("Sprint Agreement"). On January 17, 2003, Verizon filed its Motion for Approval of Final Arbitration Agreement or, in the Alternative, For Clarification ("Motion"). Attached as Exhibit A to its Motion, Verizon provides the Department with, and seeks approval of, contract language that it alleges conforms to the Arbitration Order. On January 23, 2003, GNAPs filed its opposition to Verizon's Motion ("Opposition").

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2. Section 252(i) of the Act provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

Appendix C

II. *POSITIONS OF THE PARTIES*

A. *VERIZON*

Verizon contends that GNAPs first informed Verizon that it intended to adopt the Sprint Agreement, rather than finalize the contract language in accordance with the Arbitration Order, on or about January 8, 2003 (Motion at 3-4). Verizon states that it informed GNAPs that such adoption was inappropriate, and forwarded to GNAPs contract language that, according to Verizon, conforms to the Arbitration Order (*id.* at 4).

Verizon maintains that, despite its request to do so, GNAPs failed to provide any comments on the contract language; instead, Verizon states, GNAPs forwarded Verizon a letter, dated January 14, 2003, purportedly seeking clarification on issues already addressed by the Arbitration Order (Motion at 4). Thereafter, on January 16, 2003, Verizon notes, GNAPs informed the Department that it intended to adopt the Sprint Agreement (*id.*). GNAPs' conduct; argues Verizon, clearly demonstrates a refusal to comply with the Department's Arbitration Order and to fulfill its obligations to engage in good faith negotiations (Motion at 4).

Additionally, Verizon alleges that the sole reason GNAPs seeks to adopt the Sprint Agreement is to avoid the Department's rulings in the Arbitration Order, but, argues Verizon, use of the § 252(i) adoption process for this purpose is improper (*id.* at 5). Verizon notes that GNAPs has appealed the Arbitration Order to both the Supreme Judicial Court and the United States District Court, and urges the Department not to permit GNAPs' additional collateral attack on the

Arbitration Order through adoption of the Sprint Agreement (*id.*).

Verizon also argues that GNAPs' conduct is inconsistent with its obligations under the Act (Motion at 5). Verizon contends that the Federal Communications Commission ("FCC") made clear that § 252 arbitration decisions are binding and that carriers that refuse to enter an arbitrated agreement may face penalties for violating their obligation to negotiate in good faith (*id.* at 5-6, citing *Local Competition Order*[3] at ¶ 1293 and 47 C.F.R. § 51.807(h)).

Verizon notes that the Sprint Agreement was available for adoption by GNAPs at the time it commenced the arbitration, but that GNAPs chose to pursue the alternate course of arbitration (Motion at 6). As a result of GNAPs' choice, Verizon maintains that the Department and Verizon expended substantial resources in connection with the arbitration (*id.*). Verizon argues that GNAPs' last minute attempt to adopt the Sprint Agreement, as well as its refusal to comply with the Arbitration Order, constitute failure to negotiate in good faith *id.*, citing § 252(b)(5) of the Act[4]).

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3. *In the Matter of Implementation of the Local Competition Provisions in theTelecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (August 9, 1996) ("*Local Competition Order*").

4. Verizon's Motion incorrectly cites to § 252(b)(8), which does not exist. Section 252(b)(5) states that:

> The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with

(Cont'd)

Verizon further contends that if the Department allows GNAPs to ignore its decision and to adopt the Sprint Agreement, it will establish a precedent that will encourage future "strategic" arbitrations and the waste of the Department's resources, as well as those of Verizon (Motion at 6). Verizon urges the Department not to permit GNAPs to game the process in this way (*id.*).

Alternatively, Verizon requests through a motion for clarification that if the Department permits GNAPs to adopt another interconnection agreement at this late stage, it should do so only on the condition that the adopted agreement be modified to reflect the Department's legal and policy determinations set forth in the Arbitration Order (Motion at 6). Finally, Verizon asks the Department to order GNAPs to reimburse Verizon for its attorneys' fees and costs incurred in connection with the arbitration proceeding (*id.*).

In sum, Verizon requests that the Department approve Verizon's contract language as the final binding agreement between the Parties. In the alternative, if the Department permits GNAPs to adopt another agreement, Verizon urges the Department to clarify that the adopted agreement must be modified to be consistent with the Arbitration Order, and also to order that GNAPs reimburse Verizon for its attorneys'

(Cont'd)

> the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

fees and costs incurred in connection with the arbitration (Motion at 7).

B. *GNAPs*

GNAPs contends that the point of Verizon's Motion is that, by arbitrating certain issues with Verizon pursuant to § 252(b) of the Act, GNAPs has waived its right to adopt existing agreements under § 252(i)[5] of the Act (Opposition at 1). This proposition, according to GNAPs, is absurd on the merits because, argues GNAPs, nothing in § 252(i) or any applicable rule or regulation suggests that a competitive local exchange carrier ("CLEC") may not opt into an existing agreement just because it has arbitrated a new one (*id.*) In fact, GNAPs maintains, the central purpose of § 252(i) is to prevent discrimination against CLECs by allowing any CLEC to operate under the same terms and conditions that apply to any other CLEC (*id.* at 2). In the present case, because the terms in the Sprint Agreement are more appropriate on the whole than the arbitrated agreement, GNAPs states that it has chosen to adopt the Sprint Agreement, and, GNAPs maintains, it is entitled to do so if it so chooses (*id*).

More specifically, GNAPs argues that § 252(i) permits any CLEC to elect to operate under the same terms and conditions contained in any effective interconnection agreement approved by the Department (Opposition at 2). GNAPs further states that

5. In its Opposition, GNAPs incorrectly cites to § 251(i) of the Act. Section 251(i), the Savings Provision, states that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."

applicable FCC rules expand this statutory right in various ways (*id.*, citing 47 C.F.R. § 51.809[6]).

Additionally, GNAPs asserts that an adoption of an agreement under § 252(i) takes effect immediately, and is not subject to state review (*id.*, *citing In the Matter of Global NAPS, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, Memorandum Opinion and Order, FCC 99-199 at n.25 (August 3, 1999)). Furthermore, GNAPs maintains that Verizon's contract language in the arbitrated agreement preserves GNAPs' right to immediately substitute the terms of the Sprint Agreement for the terms of the arbitrated agreement (Opposition at 3, *citing* Motion, Exhibit

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6. Section 51.809 requires incumbent LECs to make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to § 252 of the Act, and also prohibits incumbent LECs from limiting the availability of any individual interconnection, service, or network element arrangement, unless the incumbent LEC proves to the state commission that: (1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement; or (2) the provision of a particular interconnection, service, or element to the requesting telecommunications carrier is not technically feasible. Section 51.809 further requires that individual interconnection, service, or network element arrangements remain available for use by telecommunications carriers for a reasonable period of time after the approved agreement is available for public inspection under § 252(f) of the Act.

A, § 46.1[7]). GNAPs therefore argues that Verizon cannot claim that GNAPs would not be entitled to choose to operate under the Sprint Agreement (*id.*).

Moreover, GNAPs notes that there has been some debate in the past over the extent to which a requesting carrier may pick and choose from among the provisions of a complete agreement, and over the expiration date of an agreement; however, GNAPs maintains, because GNAPs has elected to adopt the Sprint Agreement in its entirety, and because the Sprint Agreement does not expire until July 2004, those debates are irrelevant here (Opposition at 3). GNAPs notes that Verizon has not raised these or any other ground upon which GNAPs' adoption of the Sprint Agreement is inappropriate (*id.*).

GNAPs also argues that Verizon's reliance on the *Local Competition Order* is misplaced because the cited material relates to the FCC's development of the rules that apply when the FCC acts as an arbitrator under 47 U.S.C. § 252(e)(5) (Opposition at 5). GNAPs states that, in developing those

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7. Section 46.1 states that "[t]o the extent required by Applicable Law, each Party shall comply with Section 252(i) of the Act . . . " GNAPs also references § 46.2 of the arbitrated agreement as relevant (*see* Opposition at 4). Section 46.2 states:

> To the extent that the exercise by GNAPS of any rights it may have under Section 252(i) . . . results in the rearrangement of Services by Verizon, GNAPs shall be solely liable for all costs associated therewith, as well as for any termination charges associated with the termination of existing Verizon Services.

rules, the FCC rejected the suggestion that an incumbent LEC could walk way from the results of an FCC-conducted arbitration (*id.*). GNAPs further states that the FCC expressly noted that competing providers do not have an affirmative duty to enter into agreements under § 252 (*id.*, *citing Local Competition Order* at ¶ 1293). According to GNAPs, the FCC noted that there may be circumstances in which a refusal to enter into an arbitrated agreement constitutes a failure to negotiate in good faith; however, GNAPs insists that there is no possible basis for reaching such a conclusion in the present case(*id.* at 5-6).

Finally, GNAPs accuses Verizon of wanting to discriminate against GNAPs as compared to the terms in the Sprint Agreement by trying to force GNAPs to operate on terms different from and less favorable than the Sprint Agreement (Opposition at 6). Such discrimination, GNAPs argues, is expressly forbidden under § 252(i) and, GNAPs asserts, any lack of good faith in this matter lies with Verizon (*id.*).

In sum, GNAPs argues that Verizon is not entitled to force GNAPs to waive its § 252(i) rights and operate under a less favorable agreement than the Sprint Agreement (Opposition at 6). Even if Verizon assumed that the arbitrated agreement is binding, GNAPs alleges that § 46 of that agreement expressly preserves GNAPs' right to adopt another agreement, and Verizon therefore has no right to prevent GNAPs from adopting the Sprint Agreement (*id.*). GNAPs urges the Department to affirm GNAPs' right under § 252(i) to adopt and operate under the Sprint Agreement for the remainder of that agreement's term (*id.* at 6-7).

Appendix C

IV. *ANALYSIS AND FINDINGS*

GNAPs contends that, regardless of the fact that it has arbitrated a new agreement, nothing prevents it from adopting another existing agreement (Opposition at 1). In other words, GNAPs would have us find that competing providers have an unequivocal right under § 252(i) to adopt a more favorable agreement. In effect, under GNAPs' view, § 252(i) grants GNAPs, and any other CLEC, an unconditional right to avoid obligations under a statearbitrated agreement and to enter into another agreement of its choosing instead. For the reasons discussed below, we determine that such a conclusion is at odds with Department precedent and policy, and with the Act.

First, when the Department renders a decision, that decision has the force of law. Stated differently, the Department's decision resolving the arbitrated issues is final and binding on both the parties to the arbitration. A final arbitration order may not be simply avoided by a party for different or more favorable terms, absent mutual agreement by the parties. In the present case, the Department's Arbitration Order, at 77, directed, in no uncertain terms, that Verizon and GNAPs incorporate the Department's determinations into a final agreement. The Department provided no alternatives to that directive. We find that GNAPs' January 16, 2003 letter, informing the Department of its intent to adopt the Sprint Agreement, fails to meet its obligations under the Arbitration Order. GNAPs' characterization in its January 16, 2002 letter, that the "agreed-upon schedule in this case, (as modified by the Joint Motion for Extension of Time), requires the parties to file a

contract governing the terms and conditions of exchanging traffic between them on or before January 17, 2003," grossly mischaracterizes the clear directive in the Arbitration Order to file an agreement consistent with our findings therein. Simply put, GNAPs has failed to comply with the Department's Arbitration Order.[8]

Second, the Department has recognized on numerous occasions that the Act and FCC regulations provide for binding arbitration in the event negotiations cannot be concluded within a specified time, upon petition to the state public utility commission by either party to the negotiation. *See, e.g., Consolidated Arbitrations*, D.P.U. 96-73/74, 96-75, 86-80/81, 96-83, 96-94 - Phase 1 Order at 1-2 (November 8, 1996); Phase 2 Order at 1-2 (December 3, 1996); Phase 3 Order at 1-2 (December 4, 1996);-Phase 4 Order at 1-2 (December 4, 1996). The Department has conducted all arbitrations under § 252 with the full intent that its decisions were binding on both parties. While we agree with GNAPs that the rules set forth in the *Local Competition Order* apply specifically to situations where the FCC conducts the arbitration, we find the FCC's rules instructive, as well as consistent with our requirement that arbitrations are binding on both parties to the arbitration.

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8. On December 30, 2002, GNAPs filed, pursuant to § 252(e)(6) of the Act, a complaint with the United States District Court for review of the Department's Arbitration Order. On the same day, GNAPs also filed, pursuant to G.L. c. 25 § 5, an appeal of the Arbitration Order to the Supreme Judicial Court. In both its complaint and appeal, GNAPs alleges that the Arbitration Order violates federal and/or state law. GNAPs did not seek a stay of the Department's Arbitration Order pending its complaint or appeal. Thus, the Arbitration Order remains in effect.

We find that GNAPs misreads the FCC's statement in the *Local Competition Order*, at ¶ 1293, that "competing carriers do not have an affirmative duty to enter in to agreements under section 252," as somehow granting GNAPs the right to refuse to enter into an arbitrated agreement so long as such refusal does not constitute a failure to negotiate in good faith see Opposition at 5-6).[9] The Department disagrees with GNAPs' interpretation. The more appropriate reading is that § 252 of the Act affords competing carriers the choice between purchasing services through an incumbent's tariff, negotiating an agreement, or arbitrating an agreement with the incumbent. On the other hand, incumbent LECs may not force a CLEC to purchase from its tariff, but must enter into an interconnection agreement if the CLEC requests to do so, either by negotiating or arbitration. This reading is more consistent with the Act and FCC's rules. GNAPs' interpretation would allow a carrier to choose arbitration over negotiation, and then adopt another carrier's negotiated agreement if it does not like the results of the arbitration that its own choice triggered.

Even assuming that § 252 does not impose on CLECs an affirmative duty to enter into agreements, the FCC has clearly imposed such an obligation when the FCC conducts an arbitration proceeding. Specifically, 47 C.F.R. § 51.807(h) states that "[a]bsent mutual consent of the parties to change

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9. The FCC stated that "[w]e also believe that, although competing providers do not have an affirmative duty to enter into agreements under 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith." *Local Competition Order* at ¶ 1293.

any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties." As noted above, the Department imposes a similar obligation when it conducts arbitrations pursuant to the Act. In fact, the FCC recognized a state's right to impose such an obligation. More precisely, the FCC stated that its rules may "offer guidance the states may, at their discretion, wish to consider in implementing their own mediation and arbitration standards. *Local Competition Order* at ¶ 1283.[10] Consistent with FCC rules, the Department has since it began arbitrating contracts in 1996 and continues to require that its decisions reached through arbitration are binding on the parties.

Additionally, we find GNAPs' interpretation of § 46.1 of the arbitrated agreement to be incorrect. GNAPs would have us conclude that it has the right to void an existing binding contract and enter into a new, and more favorable contract, at any point. Such a conclusion is at odds with the definition of a contract. A contract binds both parties -- a contract that permits one party absolute discretion to void the contract and to enter into another contract of its choosing is no contract at all. Under GNAPs' interpretation of § 252(i) of the Act and §46.1 of the arbitrated agreement, nothing prevents GNAPs from voiding and adopting a more favorable contract, and from doing so repeatedly as soon as it discovers a more favorable agreement to adopt. Such a result is inconsistent with the Act's requirement that carriers negotiate

10. Regardless of what the FCC rules state for FCC-conducted arbitrations, we note that the FCC rules are not binding on the Department. It is the Department's own arbitration standards, which have been applied consistently since the passage of the Act, that are relevant here.

in good faith. Accordingly, we find GNAPs' argument to be without merit.

Similarly, we are not convinced by GNAPs' claim that the purpose of § 252(i) -- to prevent discrimination against CLECs by allowing any CLEC to operate under the same terms and conditions that apply to any other CLEC -- somehow entitles GNAPs to adopt the Sprint Agreement in lieu of finalizing the arbitrated agreement. The § 252(i) adoption process permits a CLEC, during the negotiation process, to adopt another carrier's contract, not to do so after a decision has been reached through arbitration. The § 252(i) adoption process also allows a CLEC to avoid the costs and delay associated with negotiating its own contract. In the present case, we find that GNAPs' invocation of the § 252(i) adoption process is merely an attempt to avoid the Department's rulings in the Arbitration Order, and we agree with Verizon that such use is improper. The § 252(i) adoption process is not a loophole to evade the effectiveness of an arbitrated decision. Accordingly, we reject GNAPs' attempted adoption of the Sprint Agreement as somehow satisfying its obligations under our Arbitration Order.

We are also unpersuaded by GNAPs' claim of discrimination. Once again, we reiterate that the decision reached through arbitration is binding and the directives contained in the Arbitration Order are clear and enforceable. As such, we will not accept GNAPs' attempt to adopt the Sprint Agreement as compliance.

Third, public policy reasons exist which dictate that decisions reached through arbitration are binding on both

parties. To begin, permitting either party to an arbitration the ability to ignore our final decision undermines the arbitration process. We agree with Verizon that if GNAPs is permitted to ignore the Arbitration Order, it would establish precedent that encourages "strategic" arbitrations and permits carriers to game the system. For instance, without binding arbitrations, a carrier would have no incentive to negotiate in good faith as required by § 252(b)(5) because, if the carrier does not obtain the terms it desires through negotiations, the carrier could arbitrate for its desired result. If the desired result is not achieved through arbitration, the carrier can simply adopt another carrier's agreement that is more consistent with its desired result and, thus, be no worse off than at the beginning of the arbitration process. We will not permit such a result. Finally, the Department invests significant time, effort, and resources to arbitrate and render arbitration decisions. Permitting GNAPs to adopt another agreement in lieu of the decision reached through arbitration would result in a waste of the Department's limited resources, as well as an unnecessary burden on Verizon. That result is contrary to the public interest.

As noted above, we find that GNAPs' proffer of the Sprint Agreement fails to comply with our directives. As Verizon points out, the Sprint Agreement was available to GNAPs for adoption before GNAPs filed its petition for arbitration and, at any point prior to the issuance of our final Arbitration Order, GNAPs could have chosen to adopt the Sprint Agreement. But, once our final Arbitration Order was issued, the adoption process under § 252(i) was not a lawful option in order to comply with the arbitrated decision. Verizon, on the other hand, has complied with our directive

to incorporate our determinations into a final agreement. *See* Motion, Exhibit A. We have reviewed the agreement submitted by Verizon and find that it complies with our directives in the Arbitration Order. Accordingly, we grant Verizon's Motion and hereby approve the final arbitration agreement.[11] We direct the parties to sign the approved arbitration agreement and to submit a copy to the Department within seven (7) days of this Order.

> In conclusion, we remind the Parties that § 252(b)(5) of the Act provides that:
>
> The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

We caution GNAPs that GNAPs' failure to sign the Department-approved arbitration agreement, as directed herein, will be deemed a refusal to cooperate with the Department in carrying out its function as arbitrator, and thus, shall be considered a failure to negotiate in good faith, as well as a violation of a lawfully-entered Department order. *See* G.L. c. 159, §§ 39, 40.

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11. Because we grant Verizon's Motion for approval of the final arbitration agreement, we do not reach the merits of Verizon's request, in the alternative, for clarification.

Appendix C

V. *ORDER*

After due consideration, it is

ORDERED: That the issues under consideration in this Order be determined as set forth in this Order; and it is

FURTHER ORDERED: That Verizon's Motion for Approval of Final Arbitration Agreement or, in the Alternative, For Clarification, is granted; and it is

FURTHER ORDERED: That the Final Arbitration Agreement submitted to the Department as Exhibit A in Verizon's Motion is hereby approved;

FURTHER ORDERED: That the Parties sign and submit a copy of the executed Final Arbitration Agreement to the Department within seven (7) days of the date herein.

By Order of the Department,

/s/
Paul B. Vasington, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Deirdre K. Manning, Commissioner

APPENDIX D — RELEVANT STATUTES AND REGULATION

U.S. Code

TITLE 47 — TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 — WIRE OR RADIO COMMUNICATION

SUBCHAPTER II — COMMON CARRIERS

PART II — DEVELOPMENT OF COMPETITIVE MARKETS

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers — Each telecommunications carrier has the duty —

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers — Each local exchange carrier has the following duties:

(1) Resale — The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

Appendix D

(2) Number portability — The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity — The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way — The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation — The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers — In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate — The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection — The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network —

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access — The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

Appendix D

(4) Resale — The duty —

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes — The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation — The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

Appendix D

(d) Implementation

(1) In general — Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards — In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether —

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations — In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that —

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction — The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs — The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number — The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

Appendix D

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption — Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule — The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption — The exemption provided by this paragraph shall not apply with respect to a

request under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers — A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification —

(A) is necessary —

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity — The State commission shall act upon any

petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements — On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) "Incumbent local exchange carrier" defined

(1) Definition — For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that —

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (**47 C.F.R. § 69.601**(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents — The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if —

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision — Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

Appendix D

U.S. Code

TITLE 47 — TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 — WIRE OR RADIO COMMUNICATION

SUBCHAPTER II — COMMON CARRIERS

PART II — DEVELOPMENT OF COMPETITIVE MARKETS

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before

February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning —

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the

unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

Appendix D

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall —

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section —

(A) shall be —

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless —

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed —

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged

to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject —

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that —

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent

with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement

shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Appendix D

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission —

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this

section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Appendix D

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

Appendix D

CODE OF FEDERAL REGULATIONS

TITLE 47—TELECOMMUNICATION

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

SUBCHAPTER B—COMMON CARRIER SERVICES

PART 51—INTERCONNECTION

SUBPART I—PROCEDURES FOR IMPLEMENTATION OF SECTION 252 OF THE ACT

Current through August 20, 2004; 69 FR 51753

§ 51.809 Availability of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

Appendix D

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular agreement to the requesting carrier is not technically feasible.

(c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.